In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-722

DAVID ALLEN STARR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was tried and convicted on one count of a "superseding indictment" returned by the grand jury (A-2). Petitioner appealed to the Court of Appeals, Eighth Circuit, raising two issues as stated in the opinion of that court:

> "(1) that the indictment failed to allege an essential element of the offense charged and was therefore defective, and
>
> (2) the district court abused its discretion in denying Starr's motion for severance." (A-2)

The Court of Appeals reversed on the second issue and remanded for a new trial.

However, the Court of Appeals, joining three other circuits, affirmed the trial court's ruling that the indictment was not defective. It is this latter issue which has now become "final" in the trial court and the Court of Appeals, Eighth Circuit, that Petitioner seeks certiorari.

The terse response of the United States in opposition to granting certiorari first admits that there is a conflict among the circuits. However, the Solicitor General then proceeds to argue that review is not warranted for three reasons; each of which will be separately addressed in this reply.

First, the Solicitor states that the case is not "ripe" for review because the Court of Appeals remanded *on another issue*. This argument essentially begs the question, because certiorari is always a discretionary writ. But if the Solicitor is arguing that the Supreme Court does not have *jurisdiction* to review the writ, then surely he is mistaken. 28 *USC* 1651 clearly grants the Supreme Court power to review this case, and in one of the many cases under this section, the Supreme Court exercised this power even though the circuit court had reversed for new trial, on the express grounds that it was advisable to review the judgment in its present posture "without further protracting the litigation." *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 US 117 (19.....). Further, the issue presented for review in this petition is "final" in the district court and court of appeals; but in the case cited by the government, the very issue sought to be reviewed was sent back to the trial court for a new trial. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 US 327 (1967).

Second, the Solicitor General states that this Court has previously denied certiorari on this conflict. Petitioner sees the prior denials of review on this issue as an argument *in favor* of granting certiorari. Presently, six circuits have split four to two on the issue (Petition, p. 5). While four circuits have not been heard from (apparently), at what point does the conflict need resolution? Suffice it to say that as each new circuit puts in with one side or the other, the need for resolution becomes more accute.

Thirdly, and finally, the government seems to confess the error in the first superseding indictment by announcing that the United States Attorney will seek a second superseding indictment! Petitioner's response to that revelation is that he will not oppose dismissal of the present indictment; but that the filing of yet another superseding indictment will be vigorously resisted. It is always possible that one party to an appeal will "give up" during the pendency of the matter; but until that actually occurs, the reviewing court has no reason to fail to respond to the issues raised. One might suspect that the government, by seeking yet a third indictment in this criminal case, is desperately attempting to avoid review of this issue by this Court.

In light of the serious issues presented by the Petition for Writ of Certiorari, Petitioner respectfully submits that it should be granted.

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